No. 17-269

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,

Petitioner,

v.

UNITED STATES, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF HON. DANIEL J. EVANS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The question presented in this case is whether the State of Washington has an obligation to protect and restore critical habitat for treaty-protected salmon runs that is otherwise blocked by actions of a state agency.

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INTEREST OF *AMICUS CURIAE* DANIEL J. EVANS[1]

DANIEL J. EVANS is a former Governor of the State of Washington, and a former United States Senator. Senator Evans was a member of the Washington State House of Representatives from 1957-1965. He served as governor of the State of Washington from 1965 to 1977. From 1982 to 1983 Senator Evans served as first Chairman of the Pacific Northwest Electric Power and Conservation Council, an interstate compact agency established under the Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No. 96-501, with responsibility to prepare a program to protect, mitigate and enhance the fish and wildlife resources of the Columbia River Basin. He was a United States Senator from Washington from 1983 to 1989. Senator Evans served as a member of the Senate Energy and Natural Resources Committee during his tenure as a United States Senator, and as Vice Chairman of the Senate Select Committee on Indian Affairs.

Senator Evans submits this Brief in support of the Respondents United States, *et al.* Senator Evans offers his perspective as a former elected official, especially as Governor of Washington during earlier proceedings leading up to the above-captioned matter. Senator Evans asks the Court to affirm the decision below.

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[1] This brief is filed with the written consent of all parties through blanket or individual letters of consent on file with the Clerk. No counsel for either party authored this brief in whole or in part, nor did any party or other person make a monetary contribution to the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the 1850s the United States Government signed treaties with the Indian tribes of Washington territory to extinguish their land title over most of territory. Under the treaties the tribes reserved the right to continue fishing "in common with" the non-Indian citizens of the territory. The controversy over allocation of salmon between Indian and non-Indian fishers has continued intermittently since shortly after the treaties were signed.

Throughout its history the State of Washington, through legislative enactment or initiative, has adopted laws that – intended or not – discriminated against the exercise by Indian people of their fishing rights under the treaties. After decades of litigation, the tribes have, for the most part, prevailed. Nevertheless, the State has continued to resist the fulfillment of treaty rights to fish. Generally, the State and tribes resolve harvest allocation issues through negotiation. And, for the most part, the State and tribes have a history of working together on habitat issues as well.

In the present case, however, the State of Washington, acting through the Washington Department of Transportation, has refused to repair or replace hundreds of culverts under state-maintained roads. These culverts block access to important spawning and rearing habitat for several species of salmon and steelhead, thereby causing significant harm to these species.

ARGUMENT

1. The State of Washington Undermines the Efforts of Others – Including Other State Agencies – By Failing to Protect and Restore Salmon Runs

The commitment of the Pacific Northwest as a region to protect and restore its salmon runs is unparalleled. Congress has appropriated hundreds of millions of dollars on this effort, in the Columbia River Basin, on Puget Sound and in the region's coastal rivers. In 1980, Congress authorized and directed the four Pacific Northwest states to establish the Northwest Power Planning Council to engage in planning for the region's electric power and energy needs and to protect, mitigate and restore fish and wildlife affected by development of the region's hydroelectric resources. Pacific Northwest Electric Power Planning and Conservation Act. Pub. L. No. 96-501. *Amicus* served as the first Chairman of the Northwest Power Planning Council. During his term as Chairman the Council adopted its far-reaching Columbia Basin Fish and Wildlife Program, which calls for further expenditure of ratepayer funds, collected on the sale of electric power and energy by the Bonneville Power Administration.

Likewise, the State of Washington has embarked on an ambitious effort to protect and restore salmon runs and salmon habitat. The State enacted the Salmon Recovery Act, which provides funding through its Salmon Recovery Funding Board to state, local and tribal government entities and non-governmental organizations to protect and restore salmon habitat. WASH REV. CODE Ch. 77.85. In

2007, the State of Washington enacted legislation to create the Puget Sound Partnership, and new state agency to coordinate and lead the effort to restore and protect Puget Sound, including its salmon resources and their habitat. WASH REV. CODE Ch. 90.71, 2007 Wash. Sess. Laws, Ch. 341. The Washington Legislature explicitly declared its intention that all governmental entities, including federal and state agencies, tribes, cities, counties, ports, and special purpose districts, support and help implement the partnership's restoration efforts. WASH REV. CODE § 90.71.200. The Puget Sound Partnership has adopted an aggressive Action Agenda that calls for significant investments in salmon habitat restoration. *See* http://www.psp.wa.gov/action-agenda-document.php. Through the Washington Department of Natural Resources (WDNR), the State provides funding to replace culverts under local and private roads. The WDNR's Family Forest Fish Passage Program (FFFPP) assists private forestland owners in removing culverts and other stream crossing structures that keep trout, salmon, and other fish from reaching upstream habitat. Road culverts and other structures that are aging, too small, or improperly installed can block fish from reaching their spawning grounds, and young rearing salmon from reaching the ocean. The program funds the replacement of eligible barriers with new structures. *See* https://www.dnr.wa.gov/fffpp.

Local governments also are investing millions of dollars of taxpayer funds and adopting regulations to protect and restore salmon habitat. Much of this work is intended to forestall more rigorous protections compelled under the federal Endangered

Species Act, 16 U.S.C. §§ 1531-1544. Likewise, Washington's Growth Management Act compels Washington's largest and fastest growing counties to adopt measures to protect critical habitat for salmon. WASH REV. CODE § 36.70A.710. Some counties and tribes, such as those who participate in the Hood Canal Coordinating Council, have accepted responsibility to serve as lead entities for recovery of endangered salmon species, and have spent countless hours and precious resources preparing integrated watershed management plans for areas within their jurisdiction. *See e.g.*, http://hccc.wa.gov/ (Hood Canal Coordinating Council). Other organizations, such as the Lower Columbia Fish Recovery Board, represent unique partnerships of local governments, Indian tribes, private companies and non-governmental entities to protect and restore precious salmon resources. *See e.g.*, https://www.lcfrb.gen.wa.us/ (Lower Columbia Fish Recovery Board).

Finally, several non-governmental organizations work to protect and enhance salmon habitat. Examples include the Washington Wildlife and Recreation Coalition, which *Amicus* co-founded in 1989 with the late former Governor Mike Lowry, Forterra, Long Live the Kings, and Stewardship Partners, all of which promote public-private partnerships and bipartisan efforts to promote salmon recovery. *See e.g.*, https://forterra.org/ (Forterra); https://lltk.org/ (Long Live the Kings); https://www.stewardshippartners.org/ (Stewardship Partners); https://wildliferecreation.org/ (Washington Wildlife and Recreation Coalition).

The people of the Pacific Northwest have embraced sound science to guide their actions – and

investments – to protect and restore salmon and salmon habitat. Federal, state, local and tribal entities have prepared limiting factors analyses for every major watershed in the region. Inadequate or failing culverts are identified as a significant limiting factor in almost every watershed. This is further emphasized in a document that State and federal fisheries biologists prepared for Judge Boldt in 1973. It says, simply, "To protect the spawning and rearing environment while not providing free access for the adults or unhindered outmigration for the Juveniles would, of course, be pointless." Joint Statement Regarding the Biology, Status, Management, and Harvest of the Salmon and Steelhead Resources of the get Sound and Olympic Peninsula Drainage Areas of Western Washington 17-18 (1973), J.A. at 487a, Washington v. United States, No. 17-269 (2017).

Given this commitment it is astounding that one entity with responsibility for much of this problem – the Washington Department of Transportation – objects to meaningful participation in regional, state and local salmon recovery. The physical condition of many State-maintained culverts undermines the efforts of other entities to protect and restore salmon. The district court properly directed the State Department of Transportation to take corrective action, in a timely manner.

2. The State of Washington's Recalcitrance to Comply With the Lower Court's Injunction Foments Unnecessary Social Unrest and Disrespect for the Rule of Law

Sadly, the State of Washington has a long history of intransigence when it comes to implementation of

the treaties in question in the present case. The State's intransigence is documented in *United States v. Washington*, 520 F.2d 676, 693 (9th Cir. 1975) (Burns, J., concurring), *cert denied*, 423 U.S. 1086 (1976), and in *Puget Sound Gillnetters Ass'n v. U.S. District Court*, 573 F.2d 1123 (9th Cir. 1978). In the latter case, after noting the State's continued efforts to attack the judgment in United States v. Washington, they made the following observation:

> The state's extraordinary machinations in resisting [the lower court's] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases ... the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by the litigants who offered the court no reasonable alternative.

Puget Sound Gillnetters Ass'n., 573 F.2d at 1126. At the time, the State's well-publicized reluctance fomented resistance by non-Indian citizens to enforcement of the treaties. *Puget Sound Gillnetters Ass'n*, 573 F.2d at 1128.

Amicus served as governor of Washington State during the years immediately following the first lower court decision in United States v. Washington. *Amicus* experienced first-hand the tension between Indian and non-Indian fishers. This tension is an

understandable result of conflict over a dwindling resource. But conflicts between these two groups lead to serious racial tension that the State should strive to avoid. The Ninth Circuit has noted on several occasions that the treaties established something analogous to a cotenancy in the off-reservation fishery. The Court also has noted that the distinction between the members of each groups of persons with shared ownership is political rather than racial. As the Court explained, "ethnic origin is relevant only to the degree it happens to define tribal, and their political, status." *Puget Sound Gillnetters Ass'n*, 573 F.2d at 1130. Nevertheless, racial tension is unavoidable since one group shares a racial characteristic that the other group does not.

In its brief the State makes several arguments to avoid responsibility for its part in protecting and recovering salmon and their habitat. The philosophy is referred to in literature as "the tragedy of the commons." *E.g.*, G. Hardin, The Tragedy of the Commons, 162 Science 1243 (1968). It is inappropriate for the State of Washington, which is the owner of the resource, to argue that it has no responsibility to protect treaty resources since others too are causing harm.

In the treaties the tribes agreed to share, "in common with the citizens of the territory," the abundant fishery resources of the territory, and they reserved for themselves the right to continue fishing at their "usual and accustomed" fishing places. Thus the tribes and their non-Indian neighbors – and their relationship to the region's salmon and steelhead – were inextricably linked. For this reason, it is patently unfair, and inappropriate, for the State to

attempt to blame Washington's Indian tribes for imposing an unreasonable economic burden on the State.

3. The State of Washington's Position Before This Court Conflicts With Its Responsibility To All the State's Citizens to Protect and Restore Salmon and Salmon Habitat

The State of Washington has an obligation to protect and restore the State's salmon and their habitat. The Washington courts hold that fish within the State's borders, so far as title can be asserted, belong to the state in its sovereign capacity in trust for its citizens. *See e.g., Washington Kelpers Assn. v. State*, 81 Wash. 2d 410, 414-15 502 P.2d 1170, 1172-73 (1972), *cert. denied* 411 U.S. 982 (1973); *Bacich v. Huse*, 187 Wash. 2d 75, 79-80, 59 P.2d 1101, 1103-04 (1936). Many stocks of salmon in the Puget Sound are listed under the Endangered Species Act. The Act prohibits the State from causing a taking of any listed species. 16 U.S.C. § 1538.

The State of Washington has a stewardship responsibility to its citizens – Indian and non-Indian alike – to protect and conserve its natural resources for the benefit of future generations. There is no question under the facts of this case that the current condition of the State's road culverts is causing serious harm to its salmon resources. The State's position in this case is inconsistent with its stewardship responsibility.

CONCLUSION

When considering the obligations of the federal government to our native people, a Justice of this

Court once observed that "Great nations, like great men, should keep their word." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J. dissenting). The same is true with States, which have a solemn obligation to protect the rights of native citizens. Furthermore, the State of Washington – including all its elected officials and other officers – is responsible to all its citizens – Indian and non-Indian alike – to protect our natural resources for the benefit of future generations.

Respectfully submitted,

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